

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5804 of 1984

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
2. To be referred to the Reporter or not? : YES
3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
5. Whether it is to be circulated to the Civil Judge? : NO

NAGINBHAI CHHOTUBHAI PATEL

Versus

STATE OF GUJARAT

Appearance:

MR SB VAKIL for Petitioner
MS MANISHA LAVKUMAR, AGP, instructed by
M/S MG DOSHIT & CO for Respondent No. 1, 2

CORAM : MR.JUSTICE M.S.SHAH
Date of decision: 13/08/1999

ORAL JUDGEMENT

In this petition under Article 226 of the Constitution the petitioner who was appointed as a Notified Inspector of Factories, has challenged the order dated 17.11.1984 (Annexure-G), passed by the State Government terminating the petitioner's services.

2 The petitioner was appointed by order dated

20.4.1982 (Annexure-B) as a Notified Inspector of Factories in Class II service of the State Government on temporary and ad hoc basis pursuant to which the petitioner joined the service on 4.5.1982. Thereafter by order dated 8.9.1983 (Annexure-D) the petitioner was appointed as a Notified Inspector of Factories on probation for a period of two years from the date on which the petitioner had taken over as Notified Inspector of Factories. By a Resolution dated 4.5.1984 (Annexure-F) the probation period was extended for a period of six months i.e. till 3.11.1984. By the impugned Resolution dated 17.11.1984 (Annexure-G) the petitioner's services came to be terminated. It is the aforesaid order which is under challenge in the present petition. On behalf of the respondents affidavit-in-reply is filed by Deputy Secretary to the Government in Labour & Employment Department.

3 Mr S.B.Vakil, learned counsel for the petitioner, has submitted that under the Inspector of Notified Factories (Recruitment) Rules, 1973, (for short "the Rules") as contained in the Government Notification dated 1.3.1974 (Annexure-A) the relevant Rule empowers the Government to appoint an officer on probation and to continue him on probation for a maximum period of two years only. Hence, after expiry of two years' period on 3.5.1984 the petitioner must be deemed to have been confirmed in service. Therefore, the petitioner's services could not have been terminated by treating him as a mere probationer. In the alternative, the learned counsel submitted that even if the Government had the power to extend the period of probation, then also the extended period of probation came to an end on 3.11.1984 and therefore the petitioner became a confirmed employee from 4.11.1984. Hence, at the time of terminating the petitioner's services on 17.11.1984 the petitioner could not have been treated to be a mere probationer. It is submitted that the order terminating the petitioner's services without holding an inquiry under Article 311(2) must, therefore, be declared as illegal and the petitioner be reinstated with full backwages. In support of the aforesaid contentions, the learned counsel for the petitioner has placed reliance on the decisions of the Apex Court reported in AIR 1968 SC 1210, (1999) 4 SCC 184 and (1999) 3 SCC 60.

4 On the other hand, Ms Manisha Lavkumar, learned AGP for the respondents, has opposed the petition and submitted that since there was no maximum period prescribed in the Rules, the Government had the power to extend the probation period and that the petitioner could

not be treated as a confirmed employee unless and until a specific order of confirmation was issued by the Government. It is further submitted that the petitioner did not become a confirmed employee even after 3.11.1984 since the ordinary and normal rule is that a probationer cannot be treated as a confirmed employee unless a specific order of confirmation is passed. The learned AGP has placed strong reliance on the decisions in AIR 1980 SC 42 and AIR 1998 SC 1291.

5 The Court will have to first decide the correct import and true interpretation of the relevant rules, particularly, Rules 4 and 6 which are reproduced as under:-

"4. The selected candidate shall be on probation for a period of two years.

"6. The selected candidate shall, during his probation period be required to undergo training and pass the post training examination in accordance with the Gazetted Officers (Pre-Service Training and Examination) Rules, 1970 and he shall have to furnish a security bond and a surety bond in the forms specified in Appendix-B to those rules."

As far as Rule 4 by itself is concerned, it is true that the Rule does not either contain an express power of extension nor does it stipulate expressly any maximum period of probation. In the case of WASIM BEG. V/S STATE OF UTTAR PRADESH AIR 1998 SC 1291 the Apex Court has analysed the decisions relating to probation and confirmation depending upon the provisions in the relevant service rules. There are broadly two sets of authorities dealing with this question. In those cases where the rules provide for maximum period of probation beyond which probation cannot be extended, the Apex Court has held that at the end of the maximum period of probation there will be deemed confirmation of the employee unless the rules provide to the contrary. Dharam Singh's case (AIR 1968 SC 1210) falls in this category, as there the Rule expressly provided for a maximum probation period of three years. The other line of cases deals with Rules where there is no maximum period prescribed for probation and either there is a Rule providing for extension of probation or there is a Rule which requires a specific act on the part of the employer (either by issuing an order of confirmation or any similar act) which would result in confirmation of an employee. In these cases unless there is such an order

of confirmation the period of probation would continue and there would be no deemed confirmation at the end of the prescribed period of probation.

The Apex Court then analysed the service rules in the case of Wasim Beg (supra) and found that there was no time limit up to which the probation could be extended and the appointing authority was required to issue the certificate to the appellant having satisfactorily completed the period of probation. Mr Vakil has vehemently submitted that in the rule before the Supreme Court in the case of Wasim Beg the appointing authority was required to issue a certificate about the employee having satisfactorily completed the period of probation but there are no such words in the Rule at hand and that the words "selected candidate shall be on probation for a period of two years" must be read as providing the maximum period of probation because, the expression "shall" coupled with the fact that the rule does not contain any express power of extension or any implied power by requiring the appointing authority to do any specific act connotes both minimum as well as maximum period of probation .

6 Though prima facie Mr Vakil's contention is attractive it cannot be accepted for two reasons. In the first place, Rule 6 requires the employee to pass a particular exam during the period of probation. In the instant case, the petitioner had not passed the examination during the period of two years from the date of appointment or thereafter. Secondly, and this is apart from the factual situation regarding passing of examination, even if the employee had passed the examination, the question would still be required to be considered whether the case falls in first category or the second one. It is true that prima facie Rule 4 in the present case cannot be said to be falling in one or the other category in the sense that the rule is silent on the question of extension or otherwise of the probationary period. In this situation the following principle laid down by the Supreme Court in the case of State of Maharashtra v. V.R.Saboji AIR 1980 SC 42 would come into play. In the said decision Their Lordships have held that under the ordinary and normal rule without an express order of confirmation the Government servant will not be taken to have been confirmed in the post to which he was appointed temporarily or on probation. It is, therefore, clear that it is for the rule making authority to make any departure from the ordinary and normal rule and to provide for any maximum period of probation. It, therefore, follows that unless

the rules expressly prescribe a maximum period of probation, the appointing authority must ordinarily be deemed to have the implied power to extend the period of probation. In absence of any indication in Rule 4 either way, the normal rule would apply and it must be held that there could not be automatic or deemed confirmation of a Notified Inspector of Factories unless a specific order of confirmation was passed by the State Government which was the appointing authority. Admittedly, no such order of confirmation was passed by the State Government at any point of time. This answers both the contentions of Mr Vakil that the Government had no power to extend the period of probation and secondly that the extended period of probation was in any case over on 4.11.1984. On the date of termination the petitioner continued to be a probationer and, therefore, the Government had the power to terminate the services of the petitioner without following the procedure under Article 311 (2) of the Constitution.

7 As far as the decision in the case of PUSHPA AGGARWAL V. UPSC (1999) 4 SCC 184 is concerned, in that case, the Court was concerned with the question whether termination of the services of a probationer after expiry of the initial period of probation would be bad without holding departmental inquiry. It was a case where the question was about seniority of the concerned employee and the Court found that the rule of seniority was dependent upon an employee getting quasi-permanent status. In the facts of that case the Court found that non-consideration of the petitioner's case for quasi confirmation was delayed for a pretty long time after expiry of the probation period. It was in that context that the Court held that the petitioner should be deemed to have been considered for quasi confirmation upon the date of expiry of the probation period. Even in the case of STATE OF MAHARASHTRA V. V.R.SABOJI (supra) the Court took the note of phenomenon of delay in confirmation in government service by referring to the case of S.B.PATWARDHAN V. STATE OF MAHARASHTRA (1977) 3 SCR 775 wherein it was held that the confirmation is one of the inglorious uncertainties of government service depending neither on the efficiency nor on the availability of incumbent nor on the substantive vacancies. The Court was, therefore, pleased to observe that consideration of case of a government servant for confirmation could not be made to depend on sweetwill and pleasure of the government. But, there may be several other reasons administrative or otherwise which may delay the confirmation, but the confirmation can surely be delayed if the suitability has got to be watched further to

decide whether the employee should be confirmed in the post or not.

8 The decision of the Supreme Court in the case of DIPTI PRAKASH BANERJEE V. SATYENDERA NATH BOSE NATIONAL CENTRE FOR BASIC SCIENCES (1999) 3 SCC 60 has no bearing in the facts of the case as the authority was cited for getting the relief of reinstatement with full back wages in case the Court were to hold that the impugned order was illegal. Since that eventuality has not arisen, there is no question of considering the prayer for reinstatement or back wages.

9 No other contentions have been urged. The contentions urged have no merit. The petition therefore deserves to be dismissed.

10 The petition is dismissed. Rule is discharged with no order as to costs.

(mohd)